



Reasons for decision

Superior Propane, a Division of Superior Plus LP,

applicant,

and

Teamsters Local Union No. 31;

Teamsters Local Union No. 213,

bargaining agents.

Board File: 29172-C

Neutral Citation: 2013 CIRB 689

June 28, 2013

The Canada Industrial Relations Board (the Board) was composed of Mr. William G. McMurray, Vice-Chairperson, and Messrs. John Bowman and Robert Monette, Members. A hearing was held on August 28 and 29, 2012.

Appearances

Mr. Barry Y. Dong, counsel for Superior Propane, a Division of Superior Plus LP;

Mr. E. Casey McCabe, counsel for Teamsters Local Union No. 31 and Teamsters Local Union No. 213.

These reasons for decision were written by Mr. William G. McMurray, Vice-Chairperson.

I. Nature of the Application

[1] Superior Propane, a Division of Superior Plus LP (Superior), applied to the Board seeking a declaration that it operates a federal work, undertaking or business within the scope of section 92(10)(a) of the *Constitution Act, 1867*. By extension, it says that its employees are employed on or in connection with the operation of its federal work, undertaking or business pursuant to sections 2 and 4 of the *Canada Labour Code (Part I-Industrial Relations)* (the *Code*).

[2] In its written submission dated June 7, 2012, it reminds the Board that, in cases of constitutional determinations: "it is important to focus on the work that Superior actually performs". It states:

... Superior is in the business of transporting propane through an interprovincial and international (with respect to the U.S.) distribution system to its customers. Superior's normal and habitual activities are that of an interprovincial (and international) fuel transportation undertaking. This undertaking, which includes propane gas gathering, processing and interprovincial distribution is a single federal undertaking for the purposes of section 92(10)(a) of the *Constitution Act, 1867*.

[3] For the reasons which follow, the Board dismisses the application. The Board finds that Superior is not a federal work, undertaking or business within the scope of section 92(10)(a) of the *Constitution Act, 1867*.

[4] Superior says that it gathers, processes and transports propane. There is no evidence on the record that Superior itself does so. Superior delivers its own propane; it is not a transportation undertaking. It is not normally engaged in the business of transportation in either the normal meaning or the constitutional sense of the word. Superior buys propane, in significant quantities, from oil refineries at the refinery. Superior admits that it then hires and uses third-party transportation companies (who are already subject to federal jurisdiction) to transport the propane from the refineries to its own storage depots. Superior is not a transportation company. It does not sell transportation; it sells propane. Superior is not, therefore, a transportation undertaking for the purpose of section 2(b) of the *Code*.

[5] Superior's normal and habitual activities are all related to the retail sale of propane to its customers. As a consequence of that sale, and given the nature of propane as a gas, it is simultaneously in the business of delivering propane to its customers. Superior uses its own

employees and its own trucks to deliver its own propane from its own storage depots to its customers. That said, Superior is not, as it claims, in the business of transporting propane for others. The work that the majority of Superior's employees actually perform is, primarily, the delivery of propane from a Superior storage depot to its customers. The sale and delivery is one inseparable activity. For Superior, the sale and delivery of propane is primarily, albeit not exclusively, an intra-provincial activity. Its labour relations are, therefore, caught within the presumption of provincial competence.

II. Background

[6] Superior identified Teamsters Local Union No. 31 and Teamsters Local Union No. 213 as the respondents to its application.

[7] In July 1957, the British Columbia Labour Relations Board (BCLRB) certified Teamsters Local Union No. 213 as the bargaining agent for a unit composed of certain Superior employees located in the province of British Columbia "south of Prince George".

[8] In August 1965, the BCLRB certified Teamsters Local Union No. 31 as the bargaining agent for a unit composed of certain Superior employees located in the province of British Columbia "at and north of Prince George".

[9] Those BCLRB certifications have both been amended many times over the years and were still in effect at the time Superior filed its application with this Board. Superior is a party to a collective agreement with each of the two bargaining units in the province of British Columbia. Copies of the certification orders and copies of the collective agreement are on the record of the proceeding.

[10] In June 1997, the Canada Labour Relations Board (the CLRB) certified Teamsters Local Union No. 31 as the bargaining agent for a unit of employees, then employed by ICG Propane, within the Yukon. Following a sale of business from IGC Propane to Superior, that order was amended by this Board in December 2001, to substitute Superior as the relevant employer. Board order no. 8182-U dated December 14, 2001. A collective agreement is in effect.

[11] Superior also advised the Board that it has a bargaining relationship with a trade union in the province of Quebec. That trade union is the Glass, Molders, Pottery, Plastics and Allied Workers International Union. Superior did not provide us with a copy of the certification order or any other details to identify the nature or extent of that bargaining unit.

[12] Superior operates in all 13 legal jurisdictions of Canada, but is not subject to any collective bargaining relationships other than those listed above.

[13] Throughout the hearing, Teamsters Local Union No. 31 and Teamsters Local Union No. 213 took a common position in opposition to the application and were represented by the same counsel. For convenience, we will refer to both respondents hereafter simply as "the union".

[14] When Superior filed its application with this Board, it was asking us to consolidate the two provincially regulated bargaining units within the province of B.C. into one federally regulated bargaining unit. Prior to the hearing, however, Superior dropped its request to consolidate the bargaining units. It seeks only the declaration that it is a federal undertaking and that its labour relations are subject to the *Code*.

[15] It is common practice for Board staff to address a number of standard form questions to an applicant upon receipt of an application such as this one. This is done early on, before the close of pleadings and before the matter is referred to the Board proper. In response to a one such question herein, Superior indicated that the proposed change in constitutional jurisdiction was not brought about by any change in its operations: February 17, 2012, page 3, response to question E.

III. Survey of the Relevant Law

A. Relevant Statutory Law

[16] The statutory provisions relevant to this application are found at sections 2 and 4 of the *Code* and sections 91(29) and 92(10)(a) of the *Constitution Act, 1867*.

1. The *Canada Labour Code*

[17] Sections 2 and 4 of the *Code* set out the scope of the Board's jurisdiction. Both sections expressly refer to employees employed "on or in connection with" the operation of a federal work or undertaking.

[18] Section 4 of the *Code* specifies that Part I of the *Code* applies in respect of employees who are employed on or in connection with the operation of **any** federal work or undertaking:

4. This Part applies in respect of employees who are employed on or in connection with the operation of any federal work, undertaking or business, in respect of the employers of all such employees in their relations with those employees and in respect of trade unions and employers' organizations composed of those employees or employers.

[19] Section 2 of the *Code* defines (in a non-exhaustive manner) a federal work, undertaking or business and refers, at section 2(b), to the operation of a work carried on for or in connection with transportation and communications, among other things:

2. In this Act,

"federal work, undertaking or business" means any work, undertaking or business that is within the legislative authority of Parliament, including, without restricting the generality of the foregoing,

...

(b) a railway, canal, telegraph or other work or undertaking connecting any province with any other province, or extending beyond the limits of a province.

2. The *Constitution Act, 1867*

[20] Sections 2 and 4 of the *Code* are based on, or derived from, sections 91(10) and 92(10)(a) of the *Constitution Act, 1867*.

[21] Federal jurisdiction over interprovincial and international transportation and other works is found at section 92(10)(a) read in conjunction with section 91(29).

92. In each Province the Legislature may exclusively make Laws in relation to Matters coming within the Classes of Subjects next hereinafter enumerated; that is to say,

...

10. Local Works and Undertakings other than such as are of the following Classes:

(a) Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province: ...

[22] Section 91 sets out the scope of federal legislative jurisdiction, including:

91.29. Such Classes of Subjects as are expressly excepted in the Enumeration of the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces.

[23] Section 92(10) of the *Constitution Act, 1867* provides generally that local works and undertakings within a province come within provincial jurisdiction. However, the combined effect of sections 91(29) and 92(10)(a) creates an exception whereby Parliament has exclusive jurisdiction over works and undertakings that come within the phrase "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province" in section 92(10)(a). The effect of section 92(10)(a) is that interprovincial transportation and communications works and undertakings fall within federal jurisdiction.

(*Westcoast Energy Inc. v. Canada (National Energy Board)*, [1998] 1 S.C.R. 322, at paragraph 43) (*Westcoast Energy*)

B. Key Jurisprudence

1. Courts

[24] Superior says it is a single undertaking and that its normal and habitual operations bring it under federal jurisdiction within the scope of section 92(10)(a).

[25] The leading cases from the Supreme Court of Canada (the SCC) on the scope of section 92(10)(a) consistently confirm that:

1. since 1925, labour relations have been presumptively a provincial matter;

Toronto Electric Commissioners v. Snider et al., [1925] 2 D.L.R. 5 (P.C.) (*Snider*).

2. the federal government may acquire jurisdiction over labour relations only by way of exception;

Construction Montcalm Inc. v. Min. Wage Com., [1979] 1 S.C.R. 754 (*Construction Montcalm*), at page 768.

Consolidated Fastfrate Inc. v. Western Canada Council of Teamsters, 2009 SCC 53, [2009] 3 S.C.R. 407 (*Consolidate Fastfrate*), at paragraph 27.

NIL/TU,O Child and Family Services Society v. B.C. Government and Service Employees' Union, 2010 SCC 45, [2010] 2 S.C.R. 696 (*NIL/TU,O*), at paragraph 11.

3. this exception has been "narrowly interpreted";

Consolidated Fastfrate, supra, at paragraph 27.

NIL/TU,O, supra, at paragraphs 11 and 51.

4. to determine the nature of the work, undertaking or business at issue, the trier of fact applies a "functional test";

"one must look at the normal and habitual activities of the business as those of "a going concern", without regard for exceptional or casual factors"

Construction Montcalm, supra, at page 769.

Northern Telecom v. Communications Workers, [1980] 1 S.C.R. 115, at page 139 (*Northern Telecom*)

[18] ... in determining whether an entity's labour relations will be federally regulated, thereby displacing the operative presumption of provincial jurisdiction, *Four B* requires that a court first apply the functional test, that is, examine the nature, operations and habitual activities of the entity to see if it is a federal undertaking. If so, its labour relations will be federally regulated. ...

NIL/TU,O, supra, at paragraph 18.

5. federal jurisdiction may be either direct or derivative; a work or undertaking may itself be a federal undertaking or it may be vital and integral to the operation of another core federal undertaking

2. Federal Jurisdiction over Works and Undertakings

[26] There are, therefore, two main ways in which the labour relations of the Superior employees can be held to be federal: either Superior itself is a federal work, undertaking or business or, if not, if the work performed by its employees is integral to the operation of another, existing, core federal work or undertaking. Superior argues that it is a federal work, undertaking or business and that it is subject to direct federal jurisdiction. It does not argue derivative jurisdiction.

[27] In *Central Western Railway*, the SCC considered constitutional jurisdiction over labour relations of a railway company operating a 105-mile-long line of railway. Although the line of railway it operated was located wholly within the boundaries of one province, it connected with the lines of a federally regulated railway company and there was some exchange of goods between the respective companies. The following quotation highlights the two aspects, direct or derivative, of a federal work or undertaking:

There are two ways in which Central Western may be found to fall within federal jurisdiction and thus be subject to the *Canada Labour Code*. First, it may be seen as an interprovincial railway and therefore come under s. 92(10)(a) of the *Constitution Act, 1867* as a federal work or undertaking. Second, if the appellant can be properly viewed as integral to an existing federal work or undertaking it would be subject to federal jurisdiction under s. 92(10)(a). For clarity, I should point out that these two approaches, though not unrelated, are distinct from one another. For the former, the emphasis must be on determining whether the railway is **itself** an interprovincial work or undertaking. Under the latter, however, jurisdiction is dependent upon a finding that regulation of the subject matter in question is integral to a core federal work or undertaking.

(*United Transportation Union v. Central Western Railway Corp.*, [1990] 3 S.C.R. 1112 (*Central Western Railway*); pages 1124-1125; emphasis in original)

[28] The SCC has recently held, or reiterated, that an undertaking or business that hires or retains a federally regulated transportation undertaking to transport goods and products on its behalf is not, thereby, itself a federally regulated transportation work or undertaking. The customers of interprovincial and international railway companies are not, themselves, within federal jurisdiction; a person who elects to contract with a federally regulated transportation company to transport goods across provincial or international boundaries is not, by virtue of their status as a customer or shipper, employed on or in connection with the operation of that same federally regulated transportation company: see *Consolidated Fastfrate Inc.*, *supra*, at paragraphs 43, 44, 48 and 80.

[29] Although most of the undertakings within the ambit of section 92(10)(a) are engaged in the business of transportation or communications, the ambit of section 92(10)(a) is not necessarily limited to such works, undertakings or businesses:

... the fact that an activity or service is not of a transportation or communications character does not preclude a finding that it forms part of a single federal undertaking for the purposes of s. 92(10)(a) under the first test in *Central Western, supra*.

(*Westcoast Energy, supra*, at paragraph 64)

[30] In *Westcoast Energy, supra*, the SCC explained the "single enterprise" test as:

49. In order for several operations to be considered a single federal undertaking for the purposes of s. 92(10)(a), they must be functionally integrated and subject to common management, control and direction. Professor Hogg states, at p. 22-10, that "[i]t is the degree to which the [various business] operations are integrated in a functional or business sense that will determine whether they constitute one undertaking or not". He adds, at p. 22-11, that the various operations will form a single undertaking if they are "actually operated in common as a single enterprise". In other words, common ownership must be coupled with functional integration and common management. A physical connection must be coupled with an operational connection. A close commercial relationship is insufficient.

...

65. That is not to say, however, that it is impossible to identify certain *indicia* which will assist in the s. 92(10)(a) analysis. In our view, the primary factor to consider is whether the various operations are functionally integrated and subject to common management, control and direction. The absence of these factors will, in all likelihood, determine that the operations are not part of the same interprovincial undertaking, **although the converse will not necessarily be true**. Other relevant questions, though not determinative, will include whether the operations are under common ownership (perhaps as an indicator of common management and control), and whether the goods or services provided by one operation are for the sole benefit of the other operation and/or its customers, or whether they are generally available.

(emphasis added)

[31] The legal test stipulates that two or more operations be functionally integrated and subject to common management, control and direction. The key elements of the test are functional integration and common management. One must assess the degree to which these elements are present in any given case and both must be present. Ownership by a federal undertaking will not be determinative. Mere physical connection or a close commercial relationship are insufficient to bring an otherwise local work within federal jurisdiction.

[32] Westcoast Energy Inc.'s (Westcoast) business was divided into three main parts. It operated its core undertaking, a federally regulated mainline transmission pipeline. It also operated gathering pipelines as well as processing plants. The regulatory litigation that culminated in the 1998 decision of the SCC, *Westcoast*, *supra*, began at the National Energy Board (NEB). Westcoast owned and operated a mainline transmission pipeline which was already subject to the jurisdiction of the NEB. Westcoast had applied to the NEB for various orders and certificates regarding proposed expansions of its gathering pipelines and processing plant facilities. The gathering pipelines and processing plants were located wholly within the boundaries of one province, but connected with its core interprovincial pipeline. The NEB held, in effect, that the gathering pipeline and processing plants were separate local works and therefore within provincial jurisdiction. The Federal Court of Appeal disagreed; it found federal jurisdiction: the gathering pipelines and processing plants were part of a single undertaking, integrated with the operation of the core federal undertaking, the mainline transmission pipeline. The SCC agreed; it found direct federal jurisdiction under the "single enterprise" test, cited above.

[33] Where, as here, the tribunal of first instance is being asked to determine whether a given undertaking is or is not within the federal exception for the purposes of labour relations, the SCC has also emphasized the need for a comprehensive record of evidence to determine the constitutional facts: see *Northern Telecom*, *supra*, at page 139.

[34] To conclude this summary of relevant legal principles, the Board offers a general overview comment. Although federal jurisdiction over labour relations may be exceptional and must be narrowly construed, such federal jurisdiction over labour relations does exist. Moreover, it exists for some very real practical and legal purposes. This Board must, therefore, be vigilant to ensure that the presumption in favour of provincial jurisdiction over labour relations does not unduly or improperly preclude a finding of federal jurisdiction where it is properly made out.

IV. Evidence

A. Documentary Evidence

[35] The employer provided an organization chart for its employees in the B.C. Region and in the Alberta Region: Exhibit 1, Tab 4. It also provided a corporate organization chart showing the relationship between Superior and its parent company and the rest of the corporate organization: Exhibit 1, Tab 9.

[36] The union provided a copy of the Wikipedia entry for the town of Hyder, Alaska: Exhibit 2, Tab 6. The excerpt from Wikipedia informs us that the town of Hyder, Alaska, is the easternmost town in the state; it has a population of some 87 people and is located about 3.2 km from the town of Stewart, British Columbia.

[37] The union also entered the one page excerpt from the 2009 annual report of Superior Plus Corporation: Exhibit 3. This exhibit was entered during the union cross-examination of the employer's second witness. The exhibit indicates, in chart form, the Canadian propane distribution sales volumes for Superior. The volumes are broken down both by end-use application (industrial, commercial, residential and others) as well as by region (Western Canada, Eastern Canada and Atlantic Canada). This chart indicates that Superior sold 1,305 million litres of propane in 2011. In terms of end-use application, the single greatest use was the industrial application at 769 million litres, or more than 50% of all of the propane sold. In terms of regional breakdown, the Western Canada region accounted for the greatest volume sold at 738 million litres, again in excess of 50% of the total volume.

[38] Both parties provided the Board with copies of the certification orders and related collective agreements between Superior and the relevant local of the Teamsters.

B. *Viva Voce* Evidence

[39] Superior called two witnesses: its General Counsel, Mr. Lorne O'Reilly and its Regional Operations Manager for the B.C. Region, Mr. Trevor Todd.

[40] The union called no witnesses.

[41] Mr. O'Reilly is General Counsel to Superior and to Superior Plus Corporation, the parent company. He explained the corporate organization chart and the relationship between Superior, Superior Plus LP and Superior Plus Corporation. He identified Superior as Canada's largest distributor of propane gas and propane services. He said that Superior operates, and has customers, in all 13 legal jurisdictions in Canada.

[42] Superior does not refine propane. It purchases propane, in large quantities, from its various suppliers. The suppliers are the refineries which refine crude oil into, among other things, propane gas. The suppliers are oil refineries. Superior purchases the propane in large quantities and uses third-party transportation carriers to transport the propane either by railway or by truck to Superior's various storage depots in each province. Superior, in turn, uses its own fleet of trucks to deliver propane in smaller quantities from its various storage depots to its customers. Superior itself owns or leases many of the specialized rail cars used by the third-party transportation companies to transport the propane by railway from the refineries to the Superior storage depots. Superior apparently leases railway sidings from CN Rail or CP Rail at various locations in Canada. The witness did not provide a list of the leased railway sidings or their locations. As the Board understands the evidence, much of the transportation performed by the third-party railway companies is interprovincial, often crossing more than one provincial boundary. Some of this transportation would be intraprovincial.

[43] The witness identified many of the oil refineries that Superior uses to supply itself with propane. He indicated its two primary suppliers of propane are the oil refineries located in Sarnia, Ontario, and in Edmonton, Alberta. These refineries are operated by companies such as Shell Oil or Esso. He also mentioned a refinery in Cherry Point, Washington, that, he said, Superior's operations in Vancouver, B.C., may use.

[44] He also told the panel that Superior owns and operates a salt cavern facility, which is located in the U.S. but, it seems, located relatively close to the Canada-U.S. border. This is a facility, presumably part of a former salt mine, that is airtight and secure for the storage of propane. Propane stored in the salt cavern is delivered by Superior to its customers in Ontario. Again, the witness provided few details.

[45] Regarding the B.C. region, his oral evidence was somewhat more detailed about the nature of Superior's operation. The panel got an indirect geography lesson. The witness made reference to several towns in the province of British Columbia, many of them fairly small, remote and not widely recognized. In this group were the town of Valemount and the town of Dease Lake. He also made reference to some slightly larger towns in the province of British Columbia, such as the town of Field and the town of Terrace.

[46] A Superior employee who lives in Lake Louise, Alberta, delivers approximately 800,000 litres of propane annually, to a number of Superior customers located in or near Field, B.C.

[47] He mentioned that Superior delivered over 19,000 litres of propane in the last year from either the town of Terrace, B.C., or from Stewart, B.C., to the town of Hyder in the state of Alaska. Hyder, Alaska, is a town of some 87 people located only 3.2 km from the town of Stewart, British Columbia. Although the evidence was not entirely clear on this point, it seems that the only access to Hyder, Alaska, by road, is through Stewart, B.C.

[48] Superior annually delivers over 64,000 litres of propane from Valemount, B.C., to various locations around Jasper, Alberta. These deliveries are only made in the winter. Superior's customer is an interprovincial railway company. Superior delivers the propane in a high-rail vehicle. To complete the deliveries, the high-rail vehicle does not travel by road but rather travels over the lines of railway. This is because the propane is being delivered to various propane tanks that are part of the railway switches along the railway line. These switch heaters are fuelled by propane. It seems that it is Superior, and not its railway company customer, that owns or leases the high-rail vehicle. It seems that Superior controls only one such high-rail vehicle. It appears that only one employee of Superior is employed to drive the high-rail vehicle and the only deliveries of propane made by high-rail vehicle are those made from Valemount, B.C. to the various railway switch heaters located in and around Jasper, Alberta.

[49] A high-rail vehicle is a vehicle that can operate either on rubber tires on a public roadway or may operate on steel wheels, over a line of railway. Under cross-examination, the witness stated that the Superior employee who drives the high-rail vehicle may be accompanied by an employee of the federally regulated railway company over whose tracks the high-rail vehicle is operating in order to reach the propane heaters adjacent to the railway switches. The evidence also indicated that the Superior driver may not, in fact, always be accompanied. The delivery locations along the line of railway are, apparently, remote and not otherwise accessible by public road or highway.

[50] Mr. O'Reilly said that Superior transported propane from Saskatchewan into Alberta and from The Pas, Manitoba, into Northern Saskatchewan. Superior serves Lake of the Woods, from either Ontario or from its Prairie region. Again, the witness was content to provide a general overview only of these operations. He provided no specifics as to customer names, locations, frequency or seasonal periods of deliveries or of the volume or quantities of propane involved.

[51] He said Superior formerly shipped propane from either Nova Scotia or Newfoundland and Labrador to the French islands of Saint-Pierre and Miquelon. However, he also admitted that, currently, Superior simply sells the propane and that it is delivered to the destination in Saint-Pierre and Miquelon by water by a third-party transportation company. Superior is no longer involved in either the transportation or the delivery of the propane it sells to Saint-Pierre and Miquelon.

[52] He said that Superior delivered propane to a customer in the State of Maine using third-party haulers and sometimes its own vehicles. The witness did not inform us of the customer's name, its location within the State of Maine, the number of annual deliveries or the volume or quantities of propane involved.

[53] Superior delivers propane from Whitehorse, Yukon Territory, to Haines, Alaska. The deliveries are made once per month and the volume is approximately 454,000 litres per year. These deliveries are, however, performed by a company that the witness describes as a third-party "hauler". As the Board understands this evidence, Superior is not, therefore, involved in the transportation or the delivery of the propane it sells to a customer or customers in Haines, Alaska.

[54] The Board notes that the Superior employees working out of Whitehorse, Yukon Territory, are part of a bargaining unit that is already subject to federal jurisdiction by virtue of the fact that those employees live and work in the Yukon Territory: see section 2(i) of the *Code*.

[55] The employer's second witness was its Regional Operations Manager for the B.C. Region. He is responsible for the day-to-day operations of Superior in the province of B.C. and the Yukon.

[56] His evidence addressed Superior's operations in B.C. and, given the nature of the application, focused on propane deliveries that Superior makes from various points in the province of B.C.:

- to the Yukon Territory;
- to the province of Alberta;
- to the State of Alaska.

[57] Regarding propane deliveries from various points in B.C. to the Yukon, he said that Superior loads a propane truck at Whitehorse, which then works its way down to the town of Dease Lake, B.C., making deliveries along the way. Superior then reloads the truck at Dease Lake and the driver works his way back up to Whitehorse, making deliveries of propane to various points en route. The frequency of these delivery runs is set by Superior from its Operations Center located in Guelph, Ontario. The frequency of the runs is based on the weather. These are preset runs (as opposed to will-call runs). The frequency of the runs is greater in the winter.

[58] Regarding propane deliveries from various points in B.C. to the State of Alaska, the witness indicated these deliveries usually originate from a Superior facility in Terrace, B.C., and are made to customers in the town of Hyder, Alaska. The frequency of deliveries varies from once per week to once per month. He indicated that these deliveries can be either preset or "will-call". Under cross-examination, he indicated that Superior made 18 deliveries to the town of Hyder, Alaska, in the previous year and that all of those deliveries were made during the 6-month heating season.

[59] He mentioned deliveries from Valemount, B.C., to Jasper, Alberta. He indicated that there were fewer of these trips in the winter of 2011-2012 since it was quite a warm winter. These are the same deliveries, described by the previous witness, that are made using the high-rail vehicle.

[60] He said there are other Superior deliveries of propane to another point in Alaska but he admitted that these deliveries are made to Superior's agent and are delivered by a third party. He further admitted that it is the agent that delivers the propane to Superior's customers in Alaska. The delivery of propane from the Yukon to Haines, Alaska, is made by a third-party carrier.

[61] He mentioned that Superior delivers propane to a mine in Tungsten, Northwest Territories.

[62] He described how the deliveries are physically made by Superior employees and described the type of equipment Superior owns or controls and uses to make those deliveries. He indicated that Superior abides by both federal safety standards as well as provincial safety standards. He understood that the delivery of propane by truck within the province was subject to federal regulations regarding the transportation of dangerous commodities. He did not provide us with any references to the relevant sections or give us copies of these regulations. He also mentioned, generally, that provincial safety regulations regulate the installation of propane consuming equipment within the province.

[63] He gave us some details about the types of trucks that Superior owns and operates. Apparently, these are either cylinder trucks or crane trucks or service trucks. All of these trucks are used exclusively for the delivery of propane (and, it seems, Superior does not deliver anything other than propane). He mentioned that the smallest trucks may have the capacity of only a few thousand litres of propane. The medium sized trucks, apparently with a tandem axle, can each carry as much as 18,000 litres of propane. The largest trucks, known as a tridem (meaning a three-axle truck), can each carry as much as 30,000 litres of propane.

[64] The deliveries from Terrace, B.C., to Hyder, Alaska, are made with a tandem axle truck with an 18,000 litre capacity.

[65] The witness responded to many questions in cross-examination related to the composition of the existing bargaining units at Superior. In general, that evidence confirmed that while some of the employees in each bargaining unit worked as gas fitters or were otherwise involved in the installation of propane consuming equipment, the majority of all of the employees in each bargaining unit were employed by Superior to drive Superior's propane delivery trucks and to make the deliveries to Superior's customers.

V. Positions of the Parties

A. Applicant

[66] Superior says that it operates a fuel transportation undertaking subject to direct federal jurisdiction. It says its normal and habitual activities are those of a fuel transportation undertaking. Superior says its operations are interprovincial and international in scope and are carried out on a regular and continuous basis. It says this is a qualitative, not a quantitative test. The proper legal test for the Board to apply, it argues, is the single enterprise test articulated by the SCC in *Westcoast Energy, supra*. Moreover, on the facts, it says its operations are analogous to the operations of Westcoast. Superior argues that its core undertaking (analogous to Westcoast's mainline transmission pipeline) is the interprovincial transportation of large quantities of propane between the refinery and Superior's various storage depots.

[67] Superior submits:

- Superior is in the business of transporting propane through an interprovincial and international (with respect to the U.S.) distribution system to its customers. Superior's normal and habitual activities are that of an interprovincial (and international) fuel transportation undertaking. This undertaking, which includes propane gas gathering, processing and interprovincial distribution is a single federal undertaking for the purposes of section 92(10)(a) of the *Constitution Act, 1867*.
- Superior is the largest purchaser of propane in Canada.

- Superior purchases and transports propane for its customers. It is not a producer or refinery business and is, in essence, a transporter of propane.
- Superior also ships considerable product via third-party carriers, including CP Rail, CN Rail and other rail carriers, interprovincial trucking companies, and occasionally uses aircraft. However, the interprovincial and international transportation using infrastructure and equipment owned by Superior is done on a regular and continuous basis. Most often, Superior is delivering propane to its customers or to one of its own supply locations located in the various Canadian and other jurisdictions.
- The present case is one of direct jurisdiction because the business of Superior is a "work, undertaking, or business within the legislative authority of Parliament pursuant to section 92(10)(a) of the *Constitutional Act, 1867*". It is important to consider the essential constitutional facts pertaining to Superior, which are analogous to the interprovincial federal undertaking found to be significant in *Westcoast Energy, supra*.
- Superior is not simply a chain of retail outlets, transporting its own commodities from store to store. It is truly a national transportation business that delivers propane gas to its customers in Canada and the U.S. Superior is not like a Sears, Eaton's or Canadian Tire as described in *Burns Foods (Transport) Ltd.* (1990), 81 di 114 (CLRB No. 809).

[68] Superior submits:

- that the single federal undertaking of Superior is most analogous to that of Westcoast as described by the SCC in *Westcoast Energy, supra*.
- Superior owns and operates some of the trucks which transport gas regularly and continuously from one province to another, or from the province to an international destination in the U.S. Furthermore, it is operated as a single federal work or undertaking. The common ownership amongst the various Superior entities is coupled with functional integration and common management and physical connection, as well as operational connection.

- It is the "regular and continuous" interprovincial and international shipment of product through equipment and infrastructure owned, operated or under the control of Superior that makes the difference, and brings Superior under federal regulatory jurisdiction.
- Superior submits that the fact that Westcoast uses a pipeline for interprovincial transport is indistinguishable from the fact that Superior uses a combination of its own distribution system, trucks, containers and third parties to distribute propane gas to its customers. Superior is a single federal undertaking which is functionally integrated and subject to common management, control and direction within the meaning of section 92(10)(a) of the *Constitutional Act, 1867*.

B. Respondent

[69] The union submits that the employer's application lacks both a factual foundation and a legal basis for success.

[70] The union argues that this is not a case of direct federal jurisdiction. The union says that Superior is not a federal work, undertaking or business. It says that the members of its bargaining units are not employed on or in connection with the operation of a federal work, undertaking or business. The union argues, therefore, that Superior's reliance on the test in *Westcoast Energy, supra*, is "misplaced".

[71] The union also argues that this is not a case of derivative federal jurisdiction. It acknowledges that it is not directly familiar with the operations of the parent company. It says that, if federal jurisdiction is to be found anywhere (a proposition it denies), federal jurisdiction is not direct but derivative. Moreover, the federal undertaking (if one exists at all) is not Superior itself, but its parent company. The union says that the only constitutional case that Superior could conceivably establish is that the parent company operates a federal work, undertaking or business to the extent that the parent company itself is engaged in the interprovincial transportation of propane (which it denies).

[72] The only interprovincial transportation of propane potentially at issue, according to the union, is the transportation of propane between the refinery and the Superior storage depots. That transportation work is not performed by its members. The union distinguishes the transportation of propane from the refinery to the various storage depots from the subsequent delivery of propane from those storage depots to the customer. The first activity, the transportation of propane, admittedly interprovincial, is performed by third parties and not by its members. It is equally not work performed by employees of either Superior or the parent company. The second activity, the delivery of the propane from the storage depots to the customer, predominantly intraprovincial, is performed by its members.

[73] The union says that the two activities are, in constitutional terms, distinct and severable. In other words, even if the parent company could demonstrate that it operates a federal work, undertaking or business engaged in transportation, the work performed by its members, the subsequent delivery of that propane is not vital, integral or essential to the operation of the parent company. In other words, even if the operations of the parent company were to come under the *Code* (a proposition it rejects), then Superior could still not satisfy the test for derivative jurisdiction since the Superior employees are not employed on or in connection with the operation of the parent company.

[74] The union argues that the employees in its bargaining units, who deliver propane from the storage depots to the customers, do not operate interprovincially. On the one hand, the union acknowledges that some deliveries are made, every year, by its members from storage depots in B.C. to customers in places like Hyder, Alaska, or to the railway switch heaters adjacent to railway tracks within Alberta. On the other hand, it argues that such out-of-province deliveries are geographic anomalies performed by very few of its members and are not sufficient to transform the normal and habitual nature of the work from intraprovincial to interprovincial. Moreover, those anomalous deliveries represent a very small portion of Superior's total deliveries and a correspondingly small quantity of propane.

[75] The union says the correct legal test is the three-fold functional test set out by the CLRB in *Marathon Realty Company Limited* (1977), 25 di 387; [1978] 1 Can LRBR 493; and 78 CLLC 16,138 (CLRB no. 117), as summarized as follow:

- *Is there a federal work, undertaking or business involved in the case at all?*
- *Given that there is a federal work, undertaking or business in the picture, is doing the work in question, doing work upon or in connection with the federal work, undertaking or business?*
- *Given that there is a federal work, undertaking or business and that the work in question is work upon or in connection with the federal work, undertaking or business, can the employees in question be characterized as doing that work?*

[76] The first two elements of the test look at the nature and function of the operations of the business. The third element looks at the work performed by the employees to determine whether the employees are in fact doing work that would be considered as work integral to a federal undertaking.

[77] Even if the corporate parent were found to be a federal work or undertaking, when one examines the nature of the operations of the local depots and the nature of the work of the truck drivers, plant operators and gas fitters that comprise the work force, it is clear that these employees do not form part of any interprovincial aspect of Superior Plus LP's business.

[78] It is the union's position that, even if Superior Plus LP is a federal work or undertaking engaged in the transportation of propane interprovincially, the distribution of that product within a province along with the repair, maintenance and installation of furnaces, etc., is not a core part of that federal undertaking. The fact that Superior Plus LP relies on third-party carriers to transport its product interprovincially underscores the separation of the two aspects of the business.

[79] The parent company does not operate an integrated pipeline: rather, the transportation aspect of its business is provided by third-party carriers. The employees at each of the local depots do not provide labour or services to any aspect of a federal undertaking. Their work is wholly provincial or local in nature. There is absolutely no connection between the B.C. operations and Superior Plus LP's operations in Ontario, Quebec or any other province. The services provided by the local operations are for customers and the general public, not for the benefit of Superior Plus LP.

[80] Even if it is shown that Superior Plus LP is a federal work or undertaking, an examination of the three-fold test would reveal that the work performed by the members of the Teamsters' bargaining units is work of a local nature which can be severed constitutionally and operationally from the work of Superior Plus LP. The fact that there is no nexus between the local and federal operations precludes a finding that the nature of the employer's operations has changed from provincial to federal jurisdiction.

[81] The fact that Superior has offices, depots and business operations across Canada does not make it a federal company. Canada Safeway Limited has stores across Canada that are serviced by a trucking division that transports meat, fruit and vegetables both internationally and interprovincially. The union argues: "Nobody is going to suggest that your neighbourhood Safeway stores are a federal work or undertaking because they are the end point of an interprovincial or international supply chain. By the employer's reasoning, every national or multinational corporation with a local store or operation would be a federal work or undertaking".

[82] The union asks the Board to note that neither Superior nor the parent company owns the interprovincial system that carries the parent company's propane product. That product is carried by rail and truck owned by third parties with which the parent company has a contractual relationship with respect to the interprovincial transportation.

[83] The parent company does not transport propane for other parties. The propane that is transported is Superior's own product meant for use and resale by Superior to its customers. The fact that the parent company does not own infrastructure, i.e., processing plants or pipelines, and transports its own product distinguishes this case from the *Westcoast Energy, supra*, case in a fundamental respect.

[84] It is the union's position that Superior Plus LP does not own its own pipeline or processing infrastructure, therefore, it cannot be argued that the work performed by the unions' members in B.C. is integral to the transportation aspect of the employer's business. Furthermore, the employer, in its written pleadings filed prior to the oral hearing, candidly admitted the use of third-party carriers in both truck and rail as well as the pipeline owned by Keyera to transport its product.

[85] The union argues that even if there are individual drivers within its bargaining units who are transporting Superior's products across interprovincial lines (i.e. propane that is landed in B.C. then shipped back across the provincial boundary to Alberta), where those drivers are a minor fraction of the total workforce in those provinces, the employer's argument will fail. The union does not deny that those deliveries do occur, but says that those trips are too infrequent to bring the true character of the employer's operation into an interprovincial business. Likewise, the same can be said of the infrequent trips from Valemount or other communities in Northeastern B.C. into Alberta. Failure of the employer to provide employment numbers undermines the validity of its argument that it is an interprovincial transporter of goods.

[86] The union takes the position that the central nature of Superior's business is the sale of propane gas and the servicing of propane furnaces/equipment within British Columbia. The employees in B.C. can easily be seen as forming a discreet unit within the employer's overall structure. The employees in B.C. have little participation in the interprovincial transport of the employer's product. It must be borne in mind that the propane that arrives in B.C. by rail or tanker truck is offloaded at storage depots in B.C. where the Teamsters' members work. These employees then load the propane into much smaller service trucks for delivery to wholesale and retail customers. Except as noted, the majority of Superior's employees in B.C. play no role in the broader interprovincial distribution of propane. As stated previously, the modest role

involving trips into Dease Lake by the Yukon members or Alberta by the B.C. members is insignificant when one looks at the volume of work performed by the 128 employees in both bargaining units in B.C. In short, the effective performance of the putative federal business is not dependant in any way upon the services of the B.C. employees.

[87] The unions say that Superior and its parent company are not in the business of transporting propane for third parties. Rather, they are in the business of selling their own propane and servicing the equipment that burns the propane for their own profit. They do not engage in regular and continuous transportation of propane for third parties.

VI. Analysis and Decision

[88] The functional test requires us to assess the evidence on the record of the proceeding to determine the normal and habitual activities of Superior's business as a "going concern" without regard for exceptional or casual factors.

[89] The evidence in this proceeding was somewhat sparse or limited. Superior gave us relatively little detailed evidence of any interprovincial component of its national operations. Had it wished to, it could have provided, among other things, its revenues and/or its volume of interprovincial propane sales as a percentage of its total revenues and volumes of sales. It could have given us data on the number or percentage of its employees that were engaged in interprovincial operations. Of course, that omission may have been by design, since Superior argues that the appropriate legal test is a qualitative one rather than a quantitative one.

[90] The evidence is, however, sufficient to allow the Board to determine that the normal and habitual activities of Superior and its employees are all related to and centred on the retail sale and consequential delivery of propane to its customers. As a consequence of that sale, and given the nature of propane as a gas, it is simultaneously in the business of delivering propane to its customers. Superior uses its own employees and its own specialized trucks to deliver its own propane from its own storage depots to its customers. The work that the majority of Superior's employees actually perform is, primarily, the delivery of propane from Superior's storage depots to Superior's customers. The sale and delivery is one inseparable activity. For Superior, the sale and delivery of propane is primarily, albeit not exclusively, an intra-provincial activity.

[91] Superior's employees are trained in the proper handling of propane. They drive trucks that are specially fitted to carry propane and to carry only propane. Superior's employees fill their specialized trucks with propane at one of Superior's many storage depots and then proceed to deliver that propane to Superior's various customers. They do not deliver anything other than propane and they do not deliver to anyone other than Superior's customers. There was no evidence that they deliver propane that is owned by any other company.

[92] Having reviewed and considered the evidence, we find that Superior is not a transportation undertaking. Moreover, we find that its undertaking is not analogous, in law or in fact, to that of Westcoast.

[93] Superior is not a transportation company; it does not provide transportation services. It does not sell transportation services. It sells a single product or commodity: propane. Transportation undertakings, whether local works or otherwise, have several common traits. They transport a number of different goods or commodities or cargoes. Superior delivers only propane. Transportation undertakings transport the goods of a large number of third parties only. Superior delivers its own propane only; propane that Superior has previously purchased from the various refineries. Transportation undertakings provide service between a number of origin and destination points. Superior's deliveries all originate at a single origin, one of Superior's many storage depots, and all terminate at a customer's premises. Transportation undertakings seek out (where possible) a "backhaul" of other cargo, so the transportation capacity on their return trip is not wasted. Superior has no backhaul movements. Transportation undertakings historically have a tariff of transportation rates and those rates are often distance sensitive. Superior gave us no evidence of a tariff of transportation rates or any evidence of how the alleged transportation component of their business is billed to a customer. If the price at which Superior sells its propane varies with the distance of the delivery, we were given no such evidence. The above list of common traits is not exhaustive. In short, Superior's normal and habitual activities demonstrate none of the common traits of a transportation work, undertaking or business.

[94] One of the witnesses, during redirect examination, claimed that Superior's bill of sale to its customer included a transportation fee or component. Superior, however, chose not to file any such bill of sale as an exhibit. The witness did not explain how the transportation charges are assessed or how the price that one Superior customer pays for its propane differs, if at all, from the price that another customer pays.

[95] Superior repeatedly acknowledges and admits that it "delivers" propane to its customers. Superior equates "delivery" with transportation. For all of the reasons listed in the two preceding paragraphs, the Board does not equate delivery with transportation. For example, a chain of department stores that routinely sells large or bulky items (such as, for example, a refrigerator or living room sofa) will often provide its own service to deliver those goods to its customer's home. Those department stores are not thereby considered, in fact or in law, to be providing transportation services. The head office of this Board is located in Ottawa, Ontario. Department stores in Ottawa presumably sell and deliver large or bulky items to customers located in the immediately adjacent city of Gatineau, Quebec. It is possible that they may even do so on a regular and continuous basis. Those department stores are not considered to be engaging in interprovincial transportation. The Board finds that Superior sells and delivers propane to its customers; it does not transport propane. It does not transport propane in either the ordinary sense of the word or in the constitutional sense.

[96] The Board further finds that the majority of the deliveries of propane from a Superior storage depot to a Superior customer are, in the normal course, intra-provincial deliveries. For whatever reason, Superior chose not to identify the number of storage depots it owns and controls or to give us a list of their geographic locations. That said, we are left to conclude on the evidence that, typically, Superior's customers in one province are served from a Superior storage depot in the same province.

[97] What of the clear evidence of deliveries of propane from B.C. to places in Alberta, in Alaska and in the Yukon? Superior says that these deliveries are, in a constitutional sense, regular and continuous. Superior says those deliveries are sufficient to demonstrate the interprovincial nature of its undertaking. The Board does not agree. Moreover, Superior says that the appropriate legal test to determine the regular and continuous nature of the activities is a qualitative, not a quantitative test. The Board does not entirely agree.

[98] Before turning to the "regular and continuous" test, the Board must first be satisfied that the undertaking in question is, in fact, a transportation undertaking.

[99] The evidence is clear and the Board finds that Superior uses its employees and its specialized trucks to deliver propane from various locations in B.C. into Hyder, Alaska, and into railway switch heaters within Alberta, and into various points in the Yukon. The Board has found that Superior is not a transportation undertaking and that it does not transport propane but merely delivers it. If the Board is correct in so finding, then it matters not whether the deliveries to places like Hyder, Alaska, are or are not regular and continuous; at law, that test has only been applied to determine whether a transportation undertaking connects provinces or extends beyond the limits of a province for the purpose of section 92(10)(a) of the *Constitution Act, 1867*: see *Pioneer Truck Tanks Lines Ltd.*, 1999 CIRB 31, at paragraph 15, and the cases cited therein.

[100] The essential nature of the regular and continuous test was captured in the following excerpt from the *Westcoast Energy* decision of the Federal Court of Appeal. That level of court opined that Westcoast's gathering operations alone (as distinct from the processing plants and from the mainline transmission pipeline) could be considered (had it been necessary) an interprovincial transportation undertaking:

44. That being so, it is my view that even if one were to consider *Westcoast's* gathering operations as being a separate undertaking from its processing and mainline transmission operations (a position which, for the reasons given, I do not think is correct) that undertaking.... must be regarded as interprovincial because such transportation takes place on a regular and continuous basis across provincial boundaries. Nor is the fact that only a relatively small part of *Westcoast's* gathering facilities extend into Yukon, the Northwest Territories and Alberta of any constitutional significance. In *Ottawa-Carleton Regional Transit Commission and Amalgamated Transit Union, Local 279 et al., Re*,²⁰ Cory J.A. (as he then was) said:

The appellant contended that since the extent of the extraprovincial operation was very small when compared to the total operation that this, in itself, should be sufficient to exempt the undertaking from the provisions of s. 92(10)(a). This contention cannot be accepted. If the extraprovincial operation is regular and continuous, as it is here, then the undertaking falls within the section.

45. Later, in the same case, Cory J.A. continued, at page 570:

There are difficulties inherent in a quantitative approach. For example, the question must always arise, where should the line be drawn in any particular case? Should the crucial ratio be 80-20, 90-10, 95-5 or 60-40? If a quantitative approach is to be taken, then should a very large corporation with a small but regular extraprovincial business representing 4% of its operations be in a different category from a small concern with the same amount of extraprovincial business but, because of its smaller total operation, the extraprovincial work amounting to 50% of its total? Should the labour relations of the smaller concern be regulated by a different body than those of the larger business? In my view, the quantitative approach should not be adopted. Rather, the determination of the essential issue as to whether the undertaking connects provinces should be based upon the continuity and regularity of the connecting operation or extraprovincial business.

46. In my view, the Board erred on this point as well. At a minimum, all *Westcoast's* gathering facilities are subject to federal jurisdiction.

Westcoast Energy Inc. v. Canada (National Energy Board) (C.A.), [1996] 2 F.C. 263

[101] Superior, in framing its application to this Board, may have taken particular notice of the following sentence taken from the above excerpt of the Federal Court of Appeal:

Nor is the fact that only a relatively small part of *Westcoast's* gathering facilities extend into Yukon, the Northwest Territories and Alberta of any constitutional significance.

[102] Having said that, the analogy that Superior makes between its operations and those of *Westcoast*, is not, in our view, appropriate. We do not see Superior as operating a transportation undertaking and we do not, therefore, have cause or jurisdiction to apply the "regular and continuous" test. We are not satisfied that a series of one-way deliveries of propane from a storage depot to a customer, in those few cases where the depot and the customer are located in different provinces, engages the notion at section 92(10)(a) of the *Constitution Act, 1867* of "Lines of Steam or other Ships, Railways, Canals, Telegraphs, and other Works and Undertakings connecting the Province with any other or others of the Provinces, or extending beyond the Limits of the Province".

[103] Our conclusion in this regard is not unique. The CLRB made a similar finding in a 1982 decision. This Board reiterated it in a 1999 decision. The CLRB held:

The fact that it [the applicant] services clients on either side of a provincial boundary does not constitute a "connection between provinces", or "extending beyond the limits of a province" as contemplated by section 2(b) of the *Canada Labour Code*."

Hurdman Bros. Ltd. (1982), 51 di 104; and 83 CLLC 16,003 (CLRB no.394), at paragraph 111; and *Pioneer Truck Lines Ltd.*, *supra*, at paragraph 27.

[104] If the Board is mistaken, and if the "regular and continuous" test does properly apply to an assessment of Superior's various out-of-province deliveries, then the Board finds that they are not "regular and continuous". Rather, having regard to the language of the functional test, the Board finds that the circumstances surrounding the various out-of-province deliveries are exceptional. The Board does not dispute that Superior makes out-of-province deliveries of propane and that it does so in a manner similar to its local deliveries, using its own employees, its own trucks and its own propane. In that regard, Superior's arguments about its normal and habitual activities are admittedly stronger than the arguments of the employer in *Tessier Ltée v. Quebec (Commission de la santé et de la sécurité du travail)*, 2012 SCC 23, whose employees worked only occasionally as stevedores, and stronger than the employer in *Schnitzer Steel BC, Inc.*, 2012 CIRB 640, whose employees worked only sporadically as transportation drivers.

[105] Superior has satisfied us that it made some 18 deliveries of propane from Terrace, B.C., to Hyder, Alaska, in the last heating season and, no doubt, it will make a similar number of deliveries in the next heating season and so on. Admittedly, there is a certain element of regularity and continuity to those deliveries. The deliveries are *bona fide*; they respond to a genuine commercial demand from Superior's customers. The same can be said about the deliveries to the railway switch heaters. They are not some artificial construct by Superior to try to force its operations into the interprovincial sphere of federal jurisdiction.

[106] That said, when considering the evidence as a whole, these out-of-province deliveries are exceptional. They are also *de minimis*. They are not representative of Superior's normal and habitual activities as a going concern.

- The deliveries to Hyder, Alaska, may be distinguished by the fact that Hyder is a geographic and political anomaly. Hyder is an exceptionally small town (fewer than 100 people), exceptionally remote from other towns in the State and exceptionally close to the Canadian border. The residents of Hyder use a B.C. telephone area code, prefer Canadian currency, observe Canadian holidays, obtain electricity from B.C. Hydro and attend a Canadian school: Exhibit 2, Tab 6.
- The deliveries to the railway switch heaters adjacent to the railway tracks in Alberta, may be distinguished by the fact that they are few in number, are made by only one Superior employee and are made using Superior's only high-rail vehicle to a destination that apparently is accessible only by railway. Those are all exceptional circumstances.
- The deliveries to the Yukon may be distinguished by the fact that they seem to be made either by a third-party agent or involve Superior's employees who are part of the one bargaining unit in the Yukon that is already subject to the *Code*.

These exceptional circumstances cannot coexist with the "regular and continuous" test, in our view, given the clear judicial guidance that the federal scope of labour relations is an exception, to be narrowly interpreted.

[107] Finally, Superior argues that its core undertaking involves the transportation of propane between the refineries and its many storage depots and that its "fuel transportation undertaking" is a single enterprise analogous, in fact and in law, to Westcoast. We disagree.

[108] The Board has already found that Superior does not transport propane between the storage depots and its customers. The Board is also satisfied, on the evidence, that Superior does not transport propane from the refinery to its many storage depots. Superior buys propane, in significant quantities, from oil refineries at the refinery. Superior pleaded that it is the largest purchaser of propane in Canada. The Board agrees. Superior also says that it gathers, processes

and transports propane. The Board does not agree. That purchasing of propane does not, on the evidence, involve any aspect of gathering or processing propane. The propane that Superior sells to its customers is in the same state or condition as the propane that Superior purchases from the refinery.

[109] Superior says that the core of its undertaking is the transportation of propane from the refinery to its many storage depots. Superior submits that it is somehow directly involved in the transportation of the propane gas from the refinery to its storage depot. We do not share that view. The transportation of propane from the refinery to the various Superior storage depots is an entirely different operation from the subsequent delivery of propane from the storage depot to the customer. The transportation of propane from the refinery to the various storage depots is typically interprovincial, since propane is transported from refineries that are located in only two or three provinces of Canada to Superior storage depots that are located in each of the 13 jurisdictions in Canada where Superior operates. There is no evidence on the record that Superior itself performs this transportation. There is no evidence that Superior's employees are involved in any aspect of the interprovincial transportation of propane from the refinery to the various storage depots.

[110] Superior **arranges** such transportation. Superior admits that it hires and uses third-party transportation companies (who are already subject to federal jurisdiction) to transport the propane from the refineries to its own storage depots. Reference was made to its use of CN Rail, CP Rail and Trimac Transportation. Those are all recognized transportation companies. Those are all recognized federal works or undertakings.

[111] Superior **facilitates** such transportation. It is true that Superior owns or controls a significant number of railway tank cars that carry only propane. Superior provides those tank cars to the railway companies that it hires to transport its propane from the refinery to the various storage depots. Superior owns or controls a number of railway sidings where these railway tank cars may be stored. We were not given any details of the number of sidings or their locations. That said, neither Superior nor its employees are engaged in the transportation itself. The ownership or control of railway tank cars and railway sidings does not create any meaningful

nexus or integration between Superior and the third-party transportation companies it hires to transport its propane.

[112] A freight forwarder and its employees have a much closer nexus or involvement with an interprovincial transportation undertaking than Superior has, yet the SCC has recently reminded us that freight forwarders are not subject to federal regulation: *Consolidated Fastfrate, supra*. Superior is not a transportation company. It does not have any significant nexus or relationship with a transportation company in a constitutional sense. Superior is not normally engaged in the business of transportation in either the normal meaning or the constitutional sense of the word. It does not sell transportation; it sells propane. Superior is not, therefore, a transportation undertaking for the purpose of section 2(b) of the *Code*. No doubt the tank cars and the railway sidings facilitate the transportation of propane by railway. They do not, however, make Superior part of the federal railway transportation undertaking that actually transports the propane in the tank cars. The *Consolidated Fastfrate, supra*, decision is a judicial obstacle that Superior is not able to surmount.

[113] Superior hires or contracts with third-party carriers to transport the large volumes of propane from the refinery to its own storage facilities. Those third-party transportation carriers it uses include CN Rail, CP Rail and Trimac Transportation. Significantly, those railway companies are already recognized as federal transportation undertakings. Those companies transport the large quantities of propane. Those companies sell transportation services. Those companies are, in the language of section 92(10)(a) of the *Constitution Act*, 1867, "lines of railway connecting the province with any other or others of the provinces". Superior is not. The Board finds that Superior does not transport propane from the refinery to its storage facilities. In those cases where the refinery and the storage depot are located within the same province, Superior still relies upon interprovincial third-party transportation companies to effect the intraprovincial transportation of the large quantities of propane from the refinery to the Superior storage depots.

[114] Superior argues that the fact that Westcoast uses a pipeline for interprovincial transport is indistinguishable from the fact that Superior uses a combination of its own distribution system, trucks, containers and third parties to distribute propane gas to its customers. Superior therefore submits that it is a single federal undertaking which is functionally integrated and subject to common management, control and direction within the meaning of section 92(10)(a) of the *Constitutional Act, 1867*. The Board does not agree. As stated immediately above, given Superior's reliance on CN Rail, CP Rail as well as Trimac Transportation to transport its propane, the two are easily distinguishable. Superior may be a single undertaking and its operations throughout Canada may be functionally integrated and subject to common management, control and direction, but that alone does not bring it within the ambit of section 92(10)(a) of the *Constitutional Act, 1867*: *Westcoast Energy, supra*, at paragraph 65. In our view, the combination of Superior's own distribution system, trucks, containers and third parties to distribute propane gas to its customers is in no way similar to the mainline transmission pipeline, gathering pipelines and processing plants operated by Westcoast.

[115] Superior's business and operations differ significantly from the undertaking operated by Westcoast.

[116] From a legal perspective, there was never any doubt that Westcoast operated a federal work, undertaking or business. The core of its undertaking, the mainline transmission pipeline that it owned and operated, was interprovincial and thereby subject, from the very outset and for many years, to federal jurisdiction under the *National Energy Board Act*. The regulatory litigation that began at the NEB and culminated in the 1998 decision of the SCC determined whether gathering pipelines and processing plants (both wholly located within one province) were or were not part of Westcoast's existing core federal undertaking, its mainline transmission pipeline. At the time that Westcoast filed its application at the NEB, it was already subject, at least in part, to federal jurisdiction. Superior, on the other hand, applied to this Board for an initial declaration that its operations were subject to federal jurisdiction. Recall, Superior had been content, for several decades, to have its operations and its employees subject to provincial jurisdiction. Unlike Westcoast, Superior cannot point in the application it filed to an existing part or aspect of its operations in any of the provinces of Canada (not including the Territories) that have been recognized as subject to federal jurisdiction for a significant period of time.

[117] From a factual perspective, Westcoast's operations are also entirely different. From the outset, Westcoast owned a mainline transmission pipeline, some 2,576 km long, connecting Alberta and British Columbia to the international boundary where it connected with the interstate gas pipeline owned and operated in the U.S. by Northwest Pipeline Corporation. Westcoast used its own employees to operate its own pipeline. Westcoast transported gas for third parties. It did not own or deal in the natural gas that it transported. Superior, on the other hand, does not own or operate any of the critical infrastructure used by third parties to transport Superior's propane from the refinery to Superior's storage depots. Superior relies extensively on third-party transportation undertakings; Westcoast, not at all. It is true that Superior owns and controls some railway tank cars and leases some railway sidings, however, neither Superior nor its employees are involved in the operation of those railway sidings or the movement of those tank cars. The transportation of propane from the refinery is admittedly interprovincial, but it happens without any involvement of Superior's own employees. Neither Superior nor its employees perform or direct or control the manner in which the interprovincial transportation is carried out by others. Superior deals in the propane that it causes others to transport from the refineries; Superior sells that propane to its customers.

[118] Westcoast's operations also include the gathering of raw gas and the processing of it into a form suitable for subsequent transportation via its mainline transmission pipeline. As stated previously, there is no evidence before us that Superior or its employees are involved in gathering or processing the propane that Superior purchases at the third-party refineries.

[119] The business of Westcoast is the interprovincial transportation of natural gas by pipeline for the account of others. The primary business of Superior is the sale and consequential delivery of propane (mostly, but not exclusively, intraprovincial delivery) on its own account. Westcoast provides and sells a service, namely the transportation of natural gas. Superior provides and sells a product, namely propane.

[120] To conclude this part of our reasons for decision, we have focused, as Superior requested us to do, on "the work that Superior actually performs". We are not able to conclude that Superior is in the business of transporting propane through an interprovincial and international distribution system to its customers. Although Superior may well operate a single undertaking in

all jurisdictions of Canada, we cannot conclude that its undertaking includes propane gas gathering, processing and interprovincial distribution, as alleged, and cannot therefore conclude that it operates a fuel transportation undertaking for the purposes of section 92(10)(a) of the *Constitution Act, 1867*.

VII. Conclusion and Decision

[121] For all of the above reasons, Superior has not satisfied the Board that it is a work, undertaking or business within the scope of the federal exception to provincial jurisdiction at section 92(10)(a) of the *Constitution Act*. The Board dismisses the application for lack of jurisdiction.

William G. McMurray
Vice-Chairperson

John Bowman
Member

Robert Monette
Member